

Übersetzung durch Brian Duffett. Laufende Aktualisierung der Übersetzung durch Ute Reusch.

Translation provided by Brian Duffett. Translation regularly updated by Ute Reusch. Stand: Die Übersetzung berücksichtigt die Änderung(en) des Gesetzes durch Artikel 4 des Gesetzes vom 17.2.2016 (BGBl. I S. 233)

Version information: The translation includes the amendment(s) to the Act by Article 4 of the Act of 17.2.2016 (Federal Law Gazette I p. 233)

## **Act Against Unfair Competition**

### **(Gesetz gegen den unlauteren Wettbewerb, UWG)<sup>1</sup>**

Act Against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette I p. 254), as last amended by Article 4 of the Act of 17 February 2016 (Federal Law Gazette I p. 233)

**Footnote 1:** This Act serves to implement Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (OJ L 149 of 11.6.2005, p. 22; rectified in OJ L 253 of 25.9.2009, p. 18), as well as Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (OJ L 376 of 27.12.2006, p. 21). This Act further serves to implement Article 13 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201 of 31.7.2002, p. 37), as last amended by Article 2 Number 7 of Directive 2009/136/EC (OJ L 337 of 18.12.2009, p. 11).

There has been compliance with the obligations under Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204 of 21.7.1998, p. 37), as last amended by Directive 2006/96/EC (OJ L 363 of 20.12.2006, p.81).

#### **Chapter 1**

##### **General provisions**

##### **Section 1**

##### **Purpose of the Act**

This Act shall serve the purpose of protecting competitors, consumers and other market participants against unfair commercial practices. At the same time, it shall protect the interests of the public in undistorted competition.

##### **Section 2**

##### **Definitions**

(1) Within the meaning of this Act the following definitions shall apply:

1. "Commercial practice" shall mean any conduct by a person for the benefit of that person's or a third party's business before, during, or after, the conclusion of a

business transaction, which conduct is objectively connected with promoting the sale or the procurement of goods or services, or with the conclusion or the performance of a contract concerning goods or services; “goods” shall be deemed to include immovable property as well, and “services” also rights and obligations;

2. “Market participant” shall mean, in addition to competitors and consumers, any person who supplies or demands goods or services;

3. “Competitor” shall mean any person who has a concrete competitive relationship with one or more entrepreneurs supplying or demanding goods or services;

4. “Communication” shall mean any information that is exchanged or passed on among a finite number of participants via a publicly accessible electronic communications service; this shall not include information that is passed on to the public as part of a broadcasting service via an electronic communications network, so far as such information cannot be linked with an identifiable participant or user receiving it;

5. “Code of conduct” shall mean an agreement or set of rules which defines the conduct of entrepreneurs who have undertaken to be bound by the code in relation to business sectors or individual commercial practices, without such obligations having been imposed by statutory or administrative provisions;

6. “Entrepreneur” shall mean any natural or legal person engaging in commercial practices within the framework of his or its trade, business, craft or profession and anyone acting in the name of, or on behalf of, such person;

7. “Professional diligence” shall mean the standard of special skill and care towards consumers, to which an entrepreneur can reasonably be expected to conform, commensurate with good faith and having regard to honest market practices, in the entrepreneur’s field of activity;

8. “to materially distort the economic behaviour of consumers” shall mean to engage in a commercial practice to appreciably impair a consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision which he would not have taken otherwise;

9. “transactional decision” shall mean any decision taken by a consumer or other market participant regarding whether, how and on what terms to conclude a transaction, make a payment for, retain or dispose of goods or services, or to exercise a contractual right in relation to the goods or services, regardless of whether the consumer or other market participant decides to act.

(2) Section 13 of the Civil Code shall apply *mutatis mutandis* to the term “consumer”.

### **Section 3**

#### **Prohibition of unfair commercial practices**

(1) Unfair commercial practices shall be illegal.

(2) Commercial practices targeting or reaching consumers shall be unfair if they are not in compliance with professional diligence and are suited to materially distorting the economic behaviour of consumers.

(3) The commercial practices in relation to consumers listed in the Annex to this Act shall always be illegal.

(4) When assessing commercial practices in relation to consumers reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to these practices or the underlying goods or services because of their mental or physical infirmity, age or credulity in a way which the

entrepreneur could reasonably be expected to foresee shall be assessed from the perspective of the average member of that group.

### **Section 3a Breach of law**

Unfairness shall have occurred where a person violates a statutory provision which is also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors.

### **Section 4 Protection of competitors**

Unfairness shall have occurred where a person

1. discredits or denigrates the distinguishing marks, goods, services, activities, or personal or business circumstances of a competitor;
2. asserts or disseminates facts about the goods, services or business of a competitor or about the entrepreneur or a member of the management of the business, such facts being suited to harming the operation of the business or the credit of the entrepreneur, to the extent that the facts are not demonstrably true; if the communications are confidential and if the person making, or receiving, the communication has a legitimate interest therein, the action shall only be unfair where facts are asserted or disseminated contrary to the truth;
3. offers goods or services that are replicas of goods or services of a competitor if he
  - a) causes avoidable deception of the purchaser regarding their commercial origin;
  - b) unreasonably exploits or impairs the assessment of the replicated goods or services; or
  - c) dishonestly obtained the knowledge or documents needed for the replicas;
4. deliberately obstructs competitors.

### **Section 4a Aggressive commercial practices**

(1) Unfairness shall have occurred where a person engages in an aggressive commercial practice which is suited to causing the consumer or other market participant to take a transactional decision which he would not have taken otherwise. A commercial practice shall be regarded as aggressive where, in the factual context and taking account of all its features and circumstances, it is suited to significantly impairing the consumer's or other market participant's freedom of choice by

1. harassment,
2. coercion, including the use of physical force, or
3. undue influence.

Undue influence shall have occurred where the entrepreneur exploits a position of power in relation to the consumer or other market participant so as to exert pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's or other market participant's ability to make an informed decision.

(2) When determining whether a commercial practice is aggressive within the meaning of the second sentence of subsection (1) account shall be taken of

1. the timing, location, nature or persistence of the practice;
2. the use of threatening or abusive language or behaviour;
3. the deliberate exploitation of any specific misfortune or circumstance of such gravity as to impair the consumer's or other market participant's judgement in order to influence his decision;
4. any onerous or disproportionate non-contractual barriers imposed by the entrepreneur where a consumer or other market participant wishes to exercise rights under the contract, including the right to terminate a contract or to switch to other goods or services or to another entrepreneur;
5. any threat to take any illegal action.

The circumstances of which account is to be taken pursuant to number 3 include, in particular, the mental and physical infirmity, age, inexperience in commercial dealings, credulity, fears and predicament of consumers.

## **Section 5**

### **Misleading commercial practices**

(1) Unfairness shall have occurred where a person engages in a misleading commercial practice which is suited to causing the consumer or other market participant to take a transactional decision which he would not have taken otherwise. A commercial practice shall be regarded as misleading if it contains false statements or other information suited to deception regarding the following circumstances:

1. the main characteristics of the goods or services, such as availability, nature, execution, benefits, risks, composition, accessories, method or date of manufacture, delivery or provision, fitness for purpose, uses, quantity, specification, after-sale customer assistance, complaint handling, geographical or commercial origin, the results to be expected from their use, or the results or material features of tests carried out on the goods or services;
2. the reason for purchase such as the existence of a specific price advantage, the price or the manner in which the price is calculated, or the conditions on which the goods are supplied or the services provided;
3. the nature, attributes or rights of the entrepreneur such as his identity, assets, including intellectual property rights, the extent of his commitments, his qualifications, status, approval, affiliation or connections, awards or distinctions, motives for the commercial practice or the nature of the sales process;
4. any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or of the goods or services;
5. the need for a service, part, replacement or repair;
6. compliance with a code of conduct by which the entrepreneur has undertaken to be bound when he makes reference to such commitment; or
7. the rights of consumers, particularly those based on promised guarantees or warranty rights in the event of impaired performance.

(2) A commercial practice shall also be regarded as misleading if in connection with the marketing of goods or services, including comparative advertising, it creates a risk of confusion with other goods or services or with the trade mark or other distinguishing mark of a competitor.

(3) Information within the meaning of subsection (1), second sentence, shall also be regarded to include information forming part of comparative advertising as well as

pictorial illustrations and other events that are targeted at, and are suitable for, taking the place of such information.

(4) It shall be presumed to be misleading to advertise with a price reduction in a case where the price concerned has been demanded for only an unreasonably short period of time. In the event of dispute as to whether, and for what period of time, the price was demanded, the burden of proof shall fall upon the person who advertised with the price reduction.

#### **Section 5a** **Misleading by omission**

(1) In assessing whether the concealment of a fact is misleading, consideration shall be given in particular to its significance for the transactional decision according to prevailing public opinion, as well as to the suitability of the concealment for influencing the decision.

(2) Unfairness shall have occurred where a person, in a factual context and taking account of all the features and circumstances, omits material information

1. which the consumer needs, according to the context, to take an informed transactional decision and
2. whose omission is suited to causing the consumer to make a transactional decision which he would not have taken otherwise.

The following shall also be regarded as an omission of information:

1. the hiding of material information,
2. the provision of material information in an unclear, unintelligible or ambiguous manner,
3. the provision of material information in an untimely manner.

(3) Where goods or services are offered with reference to their characteristics and price in such manner appropriate to the communication medium used that an average consumer can conclude the transaction, the following information shall be regarded as material within the meaning of subsection (2) if not already apparent from the context:

1. all main characteristics of the goods or services to an extent appropriate thereto and to the communication medium used;
2. the identity and the geographical address of the entrepreneur and, where applicable, the identity and geographical address of the entrepreneur on whose behalf he is acting;
3. the total price, or in cases where the nature of the goods or services means that such price cannot be calculated in advance, the manner in which the price is calculated as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot be calculated in advance, the fact that such additional charges may be payable;
4. arrangements for payment, delivery and performance, as well as complaint handling policies so far as they depart from the requirements of professional diligence; and
5. the existence of a right of withdrawal or cancellation.

(4) Such information shall also be regarded as material within the meaning of subsection (2) as shall not be omitted in respect of consumers by virtue of EU Regulations or pursuant to legal provisions for the implementation of EU Directives for commercial communication including advertising or marketing.

(5) When deciding whether information has been omitted, account shall be taken of

1. the limitations of space or time imposed by the medium used to communicate the commercial practice and

2. any measures taken by the entrepreneur to make the information available to consumers by means other than the medium used to communicate the commercial practice referred to in number 1.

(6) Unfairness shall also have occurred where the commercial intent of a commercial practice is not identified, unless this is directly apparent from the context, and where such failure to identify the commercial intent is suited to causing the consumer to take a transactional decision which he would not have taken otherwise.

## **Section 6**

### **Comparative advertising**

(1) Comparative advertising shall mean any advertising which explicitly or by implication identifies a competitor, or goods or services offered by a competitor.

(2) Unfairness shall have occurred where a person conducting comparative advertising uses a comparison that

1. does not relate to goods or services meeting the same needs or intended for the same purpose;

2. does not objectively relate to one or more material, relevant, verifiable and representative features of the goods concerned, or to the price of those goods or services;

3. leads in the course of trade to a risk of confusion between the advertiser and a competitor, or between the goods or services offered, or the distinguishing marks used, by them;

4. takes unfair advantage of, or impairs, the reputation of a distinguishing mark used by a competitor;

5. discredits or denigrates the goods, services, activities or personal or business circumstances of a competitor; or

6. presents goods or services as imitations or replicas of goods or services sold under a protected distinguishing mark.

## **Section 7**

### **Unacceptable nuisance**

(1) A commercial practice which constitutes an unacceptable nuisance to a market participant shall be illegal. This shall apply to advertising particularly in cases where it is apparent that the solicited market participant does not want this advertising.

(2) An unacceptable nuisance shall always be assumed in the case of

1. advertising using a medium of commercial communication not listed under numbers 2 and 3 which is suited to distance marketing and through which a consumer is persistently solicited although it appears that he does not want this;

2. advertising by means of a telephone call, made to a consumer without his prior express consent, or made to another market participant without at least the latter's presumed consent;

3. advertising using an automated calling machine, a fax machine or electronic mail without the addressee's prior express consent; or

4. advertising using a communication

- a) where the identity of the sender, on whose behalf the communication is transmitted, is concealed or kept secret or
- b) which violates section 6 (1) of the Telemedia Act or in which the recipient is prompted to call up a website which violates said provision or
- c) where there is no valid address to which the recipient can send an instruction to terminate transmission of communications of this kind, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates.

(3) Notwithstanding subsection (2), number 3, an unacceptable nuisance shall not be assumed to exist in the case of advertising using electronic mail if

- 1. the entrepreneur has obtained from the customer the latter's electronic mail address in connection with the sale of goods or services;
- 2. the entrepreneur uses the address for direct advertising of his own similar goods or services;
- 3. the customer has not objected to this use; and
- 4. the customer has been clearly and unequivocally advised, when the address is collected and each time it is used, that he can object to such use at any time, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates.

## **Chapter 2**

### **Legal consequences**

#### **Section 8**

##### **Elimination; injunctive relief**

(1) Whoever engages in an illegal commercial practice pursuant to section 3 or section 7 can be sued for elimination, and in the event of the risk of recurrence, to cease and desist. The claim to cease and desist shall already pertain in the event of the risk of such contravention of section 3 or section 7.

(2) Where the contraventions are committed in a business by a member of the staff or by a person exercising a mandate, the claim to cease and desist and the claim to elimination shall be deemed to apply in relation to the owner of the business as well.

(3) The claims under subsection (1) shall vest in

- 1. every competitor;
- 2. associations with legal personality which exist for the promotion of commercial or of independent professional interests, if a considerable number of entrepreneurs belong thereto, and which distribute goods or services of the same or similar type on the same market, provided such associations are actually in a position, particularly in terms of their personnel, material and financial resources, to pursue the tasks, under their memoranda of association, of promoting commercial or independent professional interests, and so far as the contravention affects the interests of their members;
- 3. qualified entities that prove that they are entered in the list of qualified entities pursuant to section 4 of the Injunctive Relief Act or on the list of the European Commission pursuant to Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests (OJ L 110 of 1.5.2009, p. 30);
- 4. Chambers of Industry and Commerce or Craft Chambers.

(4) The assertion of the claims referred to in subsection (1) shall be inadmissible where such assertion is improper having regard to all the circumstances, especially where it

predominantly serves the purpose of generating a claim for reimbursement of expenses or of the costs of taking legal action against the contravening party. In such cases the party against which the claim is directed may demand reimbursement of the costs of his legal defence. Further claims for reimbursement shall remain unaffected.

(5) Section 13 of the Injunctive Relief Act shall apply mutatis mutandis; in section 13 (1) and (3), second sentence, of the Injunctive Relief Act the claims listed therein under the Injunctive Relief Act shall be replaced by the claims under this provision. In all other respects, the Injunctive Relief Act shall not apply, unless one of the cases listed in section 4a of the Injunctive Relief Act applies.

## **Section 9**

### **Compensation for damage**

Whoever, while acting with intent or negligently, engages in an illegal commercial practice pursuant to section 3 or section 7 shall be obliged to compensate competitors for the damage arising therefrom. The compensation claim can be asserted against persons responsible for periodical printed matter only in the case of contravention with intent.

## **Section 10**

### **Confiscation of profits**

(1) Whoever, while acting with intent, engages in an illegal commercial practice pursuant to section 3 or section 7, thereby making a profit to the detriment of numerous purchasers, can be sued for surrender of such profit to the Federal budget by those entitled, pursuant to section 8 (3), numbers 2 to 4, to assert a claim to cease and desist.

(2) Such payments as were made by the debtor, because of the contravention, to third parties or the state shall be deducted from the profit. So far as the debtor made such payments only at a time subsequent to satisfaction of the claim pursuant to subsection (1), the competent agency of the Federation shall reimburse the debtor the profit thus paid in the sum of the recorded payments.

(3) Where there is more than one creditor claiming the profit, sections 428 to 430 of the Civil Code shall apply mutatis mutandis.

(4) Creditors shall notify the competent agency of the Federation of the assertion of claims pursuant to subsection (1). Creditors can request reimbursement from the competent agency of the Federation for such expenses as were necessary for assertion of the claim, so far as they cannot obtain satisfaction from the debtor. The reimbursement claim shall be limited to the sum of the profit paid into the Federal budget.

(5) The competent agency within the meaning of subsections (2) and (4) shall be the Federal Office of Justice.

## **Section 11**

### **Statute-barred limitation**

(1) The claims under sections 8, 9 and 12 (1), second sentence, shall become statute-barred after six months.

(2) The period of statute-barred limitation shall commence when

1. the claim arises and
2. the creditor obtains knowledge, or should, without being grossly negligent, have obtained knowledge of the circumstances giving rise to the claim and of the debtor's identity.

(3) Compensation claims shall become statute-barred, irrespective of knowledge or of grossly negligent ignorance, ten years after they arise, or thirty years at the latest after occurrence of the act giving rise to the damage.

(4) Other claims shall become statute-barred, irrespective of knowledge or of grossly negligent ignorance, three years after they arise.



## **Chapter 3 Procedural provisions**

### **Section 12**

#### **Enforcement of claims, authorisation to publish, reduction of the pecuniary value of the dispute**

(1) Parties entitled to assert a claim to cease and desist should warn the debtor prior to initiating court proceedings and should give him the opportunity to resolve the dispute by incurring the obligation to cease and desist subject to a reasonable contractual penalty. If the warning is justified, reimbursement of the necessary expenses can be demanded.

(2) Provisional injunctions can be granted in order to secure the claim to cease and desist specified in this Act, also without exposition and substantiation of the conditions required by sections 935 and 940 of the Civil Procedure Code.

(3) Where by virtue of this Act a court action has been brought for injunctive relief, the court can authorise the prevailing party to publicise the judgment at the expense of the losing party if the prevailing party demonstrates a legitimate interest therein. The nature and extent of publication shall be determined in the judgment. The authorisation shall expire if it is not used within three months after entry into final and binding force. The declaration pursuant to the first sentence shall not be provisionally enforceable.

(4) Where a party in a legal dispute in which an action is brought to assert a claim resulting from one of the legal relations governed by this Act substantiates that the burden of the costs of the proceedings based on the full value in dispute would pose a substantial risk to his economic situation, the court may, upon the application of said party, order that said party's obligation to pay court costs shall be proportionate to a part of the value in dispute as adjusted to his economic situation. The order shall have the effect that

1. the beneficiary shall also be required to pay the fees of his lawyer only in relation to this part of the value in dispute,
2. the beneficiary, insofar as the costs of the legal dispute are imposed on that party or that party assumes these costs, must reimburse the court costs paid by the opposing party and the fees of his lawyer only in relation to the part of the value in dispute and
3. the beneficiary's lawyer, insofar as extra-judicial costs are imposed on the opposing party or are assumed by that party, may recover his fees from the opposing party in relation to such value in dispute as applies to the latter.

(5) The application referred to in subsection (4) may be declared for the records of the registry of the court. It shall be made before the hearing in the main proceedings. Thereafter, it shall be permissible only where the assumed or determined value in dispute is subsequently increased by the court. The opposing party is to be heard before the decision is taken on the application.

### **Section 13**

#### **Jurisdiction as to subject-matter**

(1) The Regional Courts shall have exclusive jurisdiction over all civil law disputes where a claim is asserted by virtue of this Act. Section 95 (1), number 5, of the Courts Constitution Act shall apply.

(2) The *Land* governments shall be empowered to designate by ordinance one such Regional Court as the court to hear competition disputes for the districts of several Regional Courts, provided this is conducive to the administration of justice in respect of competition disputes, especially for the purpose of ensuring consistent court decisions. The *Land* governments can delegate this power to the *Land* departments of justice.

### **Section 14**

#### **Local jurisdiction**

(1) For court actions brought by virtue of this Act jurisdiction shall lie with the court in whose districts the defendant has his or its commercial place of business or his independent professional place of business, or in the absence thereof, his or its place of residence. The defendant's domestic place of abode shall be the decisive point of reference in a case where the defendant also does not have a place of residence.

(2) Moreover, for court actions brought by virtue of this Act jurisdiction shall lie solely with the court in whose district the act was committed. The first sentence shall apply to court actions brought by those entitled to assert a claim to cease and desist, pursuant to section 8 (3), numbers 2 to 4, only if the defendant has neither a domestic commercial, or independent professional, place of business nor a place of residence.

## **Section 15**

### **Conciliation boards**

(1) The *Land* governments shall establish conciliation boards at the Chambers of Industry and Commerce for the resolution of civil law disputes where a claim is asserted by virtue of this Act (conciliation boards).

(2) Conciliation boards shall be composed of a chairperson who is qualified to hold judicial office, pursuant to the German Judiciary Act, and persons sitting as assessors. In the event of referral by a qualified entity entitled to assert a claim to cease and desist, pursuant to section 8 (3), number 3, an equal number of entrepreneurs and consumers shall act as assessors; there shall otherwise be at least two expert entrepreneurs acting as such. The chairperson shall be experienced in the field of competition law. For each disputed case the persons sitting as assessors shall be taken by the chairperson from a list that has to be compiled annually for the calendar year. Appointment should be effected with the agreement of the parties. Sections 41 to 43 and section 44 (2) to (4) of the Civil Procedure Code shall be applied *mutatis mutandis* to exclusion and rejection of members of the conciliation board. The Regional Court (Chamber for Commercial Matters or, in the event of there being no such chamber, the Civil Chamber) with jurisdiction in respect of the seat of the conciliation board shall give a decision on a motion of challenge.

(3) Referral can be made to a conciliation board in civil law disputes where a claim is asserted by virtue of this Act, provided that the opposing party consents thereto. So far as acts of competition concern consumers, each party can refer the matter to a conciliation board for a discussion with the opposing party regarding the dispute; such referral shall not require the consent of the opposing party.

(4) Section 14 shall be applied *mutatis mutandis* to the jurisdiction of the conciliation boards.

(5) The chairperson of the conciliation board can make an order for the personal appearance of the parties. The conciliation board can impose a coercive fine on a party absent without excuse. An immediate complaint, pursuant to the provisions of the Civil Procedure Code, can be lodged regarding the order for personal appearance and regarding the imposition of the coercive fine to the Regional Court (Chamber for Commercial Matters or, in the event of there being no such chamber, the Civil Chamber) with jurisdiction in respect of the seat of the conciliation board.

(6) The conciliation board shall strive for a friendly settlement. It can make the parties a written settlement proposal, giving its reasons for the settlement proposed. The settlement proposal and the reasons therefor may only be published with the consent of the parties.

(7) If a settlement is reached, it must be recorded in a specific document bearing the date upon which it was reached, and it must be signed by the members of the conciliation board who took part in the negotiation as well as by the parties. There can be recourse to compulsory execution in respect of a settlement concluded before the conciliation board; section 797a of the Civil Procedure Code shall be applied *mutatis mutandis*.

(8) The conciliation board can refuse to initiate the negotiation of a settlement if at the outset it considers the asserted claim to be ill-founded or considers itself as having no jurisdiction.

(9) The period of statute-barred limitation shall be interrupted by referral to a conciliation board as though a court action had been brought. If a settlement is not reached, the time at which the proceeding was brought to an end shall be established by the conciliation board. The chairperson shall inform the parties thereof.

(10) Where a legal dispute of the kind referred to in subsection (3), second sentence, has been brought before a court without prior referral to a conciliation board, the court can, upon application and upon setting down a new date for a hearing, enjoin the parties to refer the matter to the conciliation board in order to bring about a friendly settlement prior to such

date. In proceedings concerning an application for the granting of a provisional injunction, such order shall only be admissible with the consent of the opposing party. Subsection (8) shall not be applied. Where a proceeding is pending before the conciliation board, a court action only brought by the party opposing the application after referral to the conciliation board shall not be admissible for a declaration to the effect that the asserted claim does not exist.

(11) The *Land* governments shall be empowered to issue, by ordinance, the requisite provisions for implementing the aforementioned provisions and for regulating proceedings before the conciliation boards, particularly regarding supervision of the conciliation boards, regarding their composition, including adequate participation of entrepreneurs who are not members of the Chambers of Industry and Commerce (section 2 (2) to (6) of the Act for Temporary Regulation of the Law Governing the Chambers of Industry and Commerce, in the Federal Law Gazette III, Index Number 701-1, consolidated and published version), and regarding the enforcement of coercive fines, as well as for making stipulations on the charging of fees by the conciliation board. In staffing conciliation boards, the proposals made by consumer associations, established for a Federal *Land* and supported with public funds, shall be taken into consideration in deciding on the consumers referred to in subsection (2), second sentence.

(12) Notwithstanding subsection (2), first sentence, in the *Länder* of Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia, a person with legal knowledge and qualified to hold professional judicial office under the law of the German Democratic Republic can also be made chairperson of the conciliation board.

## **Chapter 4**

### **Criminal law provisions and provisions on regulatory offences**

#### **Section 16**

##### **Advertising incurring criminal liability**

(1) Whoever, with the intent of creating the impression of a particularly favourable offer, misleadingly advertises while using false statements in public announcements, or in communications directed towards a wider audience, shall be liable to imprisonment not exceeding two years or to a fine.

(2) Whoever in the course of trade operates to cause consumers to purchase goods, services or rights by holding out the prospect of consumers obtaining specific benefits from the promoter himself or from a third party if they cause other persons to conclude equivalent transactions where, in terms of this kind of advertising, these other persons are, in turn, to receive such benefits for corresponding advertising directed towards further purchasers shall be liable to imprisonment not exceeding two years or to a fine.

#### **Section 17**

##### **Disclosure of trade and industrial secrets**

(1) Whoever as the employee of a business communicates, without authorisation, a trade or industrial secret with which he was entrusted, or to which he had access, during the course of the employment relationship to another person for the purposes of competition, for personal gain, for the benefit of a third party, or with the intent of causing damage to the owner of the business shall be liable to imprisonment not exceeding three years or to a fine.

(2) Whoever for the purposes of competition, for personal gain, for the benefit of a third party, or with the intent of causing damage to the owner of the business, acquires or secures, without authorisation,

1. a trade or industrial secret
  - a) by using technical means;
  - b) by creating an embodied communication of the secret; or
  - c) by removing an item in which the secret is embodied;

or

2. without authorisation, uses or communicates to anyone a trade secret which he acquired through one of the communications referred to in subsection (1), or through an act of his own or of a third party pursuant to number 1, or which he has otherwise acquired or secured without authorisation

shall incur the same liability.

(3) An attempt shall incur criminal liability.

(4) In particularly serious cases the sentence shall consist in imprisonment not exceeding five years or a fine. A particularly serious case shall usually exist in circumstances where the perpetrator

1. acts on a commercial basis;
2. knows at the time of the communication that the secret is to be used abroad; or
3. himself effects a use pursuant to subsection (2), number 2, abroad.

(5) The offence shall be prosecuted upon application only, unless the criminal prosecution authority considers that it is necessary to take *ex officio* action on account of the particular public interest in the criminal prosecution.

(6) Section 5, number 7, of the Criminal Code shall apply *mutatis mutandis*.

### **Section 18**

#### **Use of models**

(1) Whoever, acting without authorisation, uses or communicates to another person models or instructions of a technical nature, particularly drawings, prototypes, patterns, segments or formulas, entrusted to him for the purposes of competition or for personal gain shall be liable to imprisonment not exceeding two years or to a fine.

(2) An attempt shall incur criminal liability.

(3) The offence shall be prosecuted upon application only, unless the criminal prosecution authority considers that it is necessary to take *ex officio* action on account of the particular public interest in the criminal prosecution.

(4) Section 5, number 7, of the Criminal Code shall apply *mutatis mutandis*.

### **Section 19**

#### **Suborning and offering disclosure**

(1) Whoever for the purposes of competition or for personal gain attempts to procure another person to commit a criminal offence pursuant to section 17 or section 18 or to incite the commission of such an offence shall be liable to imprisonment not exceeding two years or to a fine.

(2) Whoever for the purposes of competition or for personal gain offers, or accepts the offer of another person, or conspires with another person, to commit, or to incite the commission of, a criminal offence pursuant to section 17 or section 18 shall incur the same liability.

(3) Section 31 of the Criminal Code shall apply *mutatis mutandis*.

(4) The offence shall be prosecuted upon application only, unless the criminal prosecution authority considers that it is necessary to take *ex officio* action on account of the particular public interest in the criminal prosecution.

(5) Section 5, number 7, of the Criminal Code shall apply *mutatis mutandis*.

### **Section 20**

#### **Provisions on regulatory offences**

(1) Whoever while acting with intent or negligently and contrary to section 7 (1)

1. in conjunction with section 7 (2), number 2, advertises by means of a telephone call or

2. in conjunction with section 7 (2), number 3, advertises by means of an automatic calling machine

made to a consumer without his prior express consent shall have committed a regulatory offence.

(2) This regulatory offence can be penalised by imposition of a regulatory fine not exceeding three hundred thousand euro.

(3) The Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway shall be an administrative authority within the meaning of section 36 (1), number 1, of the Act on Regulatory Offences.

### **Annex (to section 3 (3))**

Illegal commercial practices within the meaning of section 3 (3) shall cover

1. the false statement by an entrepreneur that he is a signatory to a code of conduct;
2. displaying a trust mark, quality mark or the equivalent without having obtained the necessary authorisation;
3. making the false statement that a code of conduct has an endorsement from a public or other body;
4. making the false statement that an entrepreneur, a commercial practice by that entrepreneur, or goods or services have been approved, endorsed or authorised by a public or private body; or making the false statement that the terms of the approval, endorsement or authorisation have been complied with;
5. making an invitation to purchase goods or services within the meaning of section 5a (3) at a specified price when the entrepreneur does not disclose that he has reasonable grounds for believing that he will not be able to supply these, or equivalent, goods or services, or procure such supply, at such specified price for a period that is, and in quantities that are, reasonable (bait advertising). Where stocks are available for less than two days, it shall be incumbent on the entrepreneur to furnish proof of reasonableness;
6. making an invitation to purchase goods or services within the meaning of section 5a (3) at a specified price in a situation where the entrepreneur, with the intention of promoting different goods or services instead, then demonstrates a defective example of the goods or services, or refuses to show the consumer the goods or services advertised, or refuses to take orders for the goods or services or to perform the advertised service within a reasonable time;
7. making the false statement that certain goods or services will only be available generally or on particular terms for a very limited time, in order to elicit an immediate transactional decision from the consumer without the latter having the time and the opportunity to make an information-based decision;
8. making after-sale customer assistance available in a language which is not the language in which the negotiations were conducted before conclusion of the transaction, if the language originally used is not an official language of the Member State where the entrepreneur is located; this shall not apply if the consumer is informed before conclusion of the transaction that such services will be made in a language different from the language originally used;
9. making the false statement, or creating the false impression, that goods or services can be sold with legal effect;
10. making the false statement, or creating the false impression, that legally existing rights form a distinctive feature of the offer;
11. using editorial content for the purpose of sales promotion where the entrepreneur has paid for this promotion, without such connection being clearly identifiable from the content or by images or sounds (advertorial);
12. making a false claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the goods or services offered;
13. promoting goods or services similar to the goods or services of a specific manufacturer, with the intention of deceiving the consumer regarding the commercial origin of the goods or services promoted;
14. establishing, operating or promoting a sales promotional scheme requiring the consumer to pay a financial contribution in return for the opportunity to receive compensation solely or primarily from introducing other participants into the scheme (snowball or pyramid scheme);
15. falsely claiming that the entrepreneur is about to cease trading or move premises;

16. claiming that certain goods or services are able to facilitate winning in games of chance;
17. making the false statement, or creating the false impression, that the consumer has already won, or will win, a prize, or that he will obtain another benefit although such prize or benefit in fact does not exist, or that in any event the possibility of obtaining a prize or other benefit is subject to the consumer paying money or incurring a cost;
18. falsely claiming that goods or services are able to cure illnesses, dysfunction, or malformations;
19. giving false information on market conditions or sources of supply with the intention of inducing the consumer to purchase or use goods or services at conditions less favourable than general market conditions;
20. offering a competition or a promotional contest without awarding the prospective prizes or a reasonable equivalent;
21. offering goods or services as being “gratis”, “free”, “without charge”, or using a similar expression, although costs are to be paid therefor; this shall not apply to the unavoidable cost of responding to the offer of goods or services or of collecting or paying for delivery of the goods or of using the services;
22. transmitting marketing material together with a document seeking payment and creating the false impression that the goods or services marketed have already been ordered;
23. making the false statement, or creating the false impression, that the entrepreneur is a consumer or is not acting for purposes relating to his business, trade, craft or profession;
24. making the false statement, or creating the false impression, that after-sale customer assistance in relation to goods or services is available in a Member State of the European Union other than the one where the goods or services are sold;
25. creating the impression that the consumer cannot leave certain premises before prior conclusion of a contract;
26. ignoring, while conducting a personal visit to the home, a request made by the person being visited to leave or not to return, unless such visit is justified for the purpose of lawful enforcement of a contractual obligation;
27. measures to dissuade the consumer from exercising his contractual rights in an insurance relationship by requiring him to produce such documents, on assertion of his claim, as are not needed as proof of that claim, or failing systematically to respond to correspondence asserting the said claim;
28. including in an advertisement a direct exhortation to children to purchase the goods or services marketed or to persuade their parents or other adults to do so;
29. demanding payment for goods or services not ordered but supplied or rendered, or demanding the return or safekeeping of items not ordered; and
30. explicitly stating that the entrepreneur’s work or livelihood will be in jeopardy if the consumer does not purchase the goods or services.